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7 **UNITED STATES DISTRICT COURT**  
8 **DISTRICT OF NEVADA**  
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10 JOSEPH TAYLOR,

11 *Petitioner,*

12 vs.  
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14 LENARD VARÉ, *et al.,*

15 *Respondents.*  
16

3:05-cv-00489-KJD-RAM

ORDER

17 This closed habeas matter under 28 U.S.C. § 2254 comes before the Court on  
18 petitioner's motion (#14) for reconsideration of the order and judgment (## 12 & 13) entered  
19 on July 5, 2006, dismissing this action without prejudice for lack of exhaustion of state judicial  
20 remedies. The motion reflects that it was mailed for filing no earlier than August 24, 2006,  
21 more than ten days after entry of judgment. The motion thus necessarily arises under Rule  
22 60 rather than Rule 59 of the Federal Rules of Civil Procedure.

23 ***Background***

24 On or about August 26, 2005, Petitioner Joseph Taylor mailed the federal habeas  
25 petition in this matter for filing. The petition raised a single claim seeking to challenge a  
26 second amended judgment of conviction that petitioner alleged was filed in Nevada state  
27 court on October 28, 1994. He alleged that he did not receive a copy of this second amended  
28 judgment until March 2005. Petitioner's prior federal petitions appear to have challenged only

1 the original and first amended judgments of conviction without also challenging the second  
2 amended judgment of conviction.

3 On February 24, 2006, following preliminary proceedings, the Court ordered petitioner  
4 to show cause in writing why the petition should not be dismissed without prejudice for lack  
5 of exhaustion. The petition and accompanying papers reflected that petitioner had pursued  
6 administrative remedies with the Nevada Department of Corrections but had not pursued any  
7 state judicial remedies presenting his challenge to the second amended judgment of  
8 conviction.

9 On March 31, 2006, the Clerk received and filed petitioner's one-page undated  
10 response to the show cause order. In the response, petitioner did not assert that he had  
11 exhausted state judicial remedies. Instead, he conceded the point and requested that the  
12 Court enter a stay of this action under *Rhines v. Weber*, 544 U.S. 269, 125 S.Ct. 1528, 161  
13 L.Ed.2d 440 (2005), to allow petitioner "to go back and exhaust" the claim in state court.

14 By an order and judgment entered on July 5, 2006, the Court dismissed the petition  
15 without prejudice for lack of exhaustion. The Court based the dismissal on established Ninth  
16 Circuit authority holding that when a petition, such as the present petition, contains no  
17 exhausted claims but instead is completely unexhausted, the district court must immediately  
18 dismiss the petition without prejudice. *See, e.g., Jiminez v. Rice*, 276 F.3d 478, 481 (9<sup>th</sup> Cir.  
19 2001)(citing prior case law discussing the unavailability of a stay). *Accord Rasberry v. Garcia*,  
20 448 F.3d 1150, 1154 (9<sup>th</sup> Cir. 2006). The Court further observed that, even if *Rhines* were  
21 applicable to the completely unexhausted petition, petitioner's one-page conclusory show  
22 cause response in any event made no effort to demonstrate satisfaction of the criteria in  
23 *Rhines* for obtaining a stay.

24 On or after August 24, 2006, petitioner mailed the present motion for reconsideration  
25 for filing. The motion was mailed for filing after the judgment of dismissal had become final  
26 by the expiration of delays both for seeking relief under Rule 59 and for filing a notice of  
27 appeal.

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1 **Discussion**

2 Petitioner does not identify any basis under Rule 60(b) for obtaining relief from the final  
3 judgment in this matter. It is undisputed that the sole ground advanced in the petition was not  
4 exhausted both at the time that the petition was filed and at the time that final judgment was  
5 entered.

6 Petitioner represents to the Court, for the first time in his unverified motion for  
7 reconsideration, that he filed a state district court proceeding challenging the second  
8 amended judgment of conviction "on or about March of 2006," that the state district court  
9 denied relief, and that the Supreme Court of Nevada affirmed on July 28, 2006. Petitioner  
10 did not attach a copy of any such order by the state district court or state high court.<sup>1</sup> He did  
11 attach a copy of a motion for reconsideration/clarification in the state district court that was  
12 stamped filed by the state court clerk on July 11, 2006. He otherwise did not attach a copy  
13 of any petition, motion, fast track statement, order, or other paper filed in the state courts  
14 showing what claim was presented to the state courts and what rulings were made thereon.

15 For purposes of the motion for reconsideration, the Court will assume, *arguendo*, that  
16 petitioner in fact presented the claim presented in the federal petition to the state district court  
17 at some point in March 2006 and that the Nevada Supreme Court affirmed the denial of relief  
18 on July 28, 2006. Even with this *arguendo* assumption, which is far from established on the  
19 record presented on the motion for reconsideration, it is undisputed that the sole ground  
20 advanced in the petition was not exhausted both at the time that the petition was filed and at  
21 the time that the July 5, 2006, judgment was entered. The Court's without prejudice dismissal  
22 of the petition therefore was, and remains, entirely proper under well-established law.  
23 *Rasberry, supra; Jiminez, supra*. The Court's without prejudice dismissal, in and of itself,  
24 does not bar the petitioner from filing a new federal habeas petition in a new action. The  
25 present petition, however, indisputably was properly dismissed for lack of exhaustion.

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27 <sup>1</sup>The Court's show cause order directed petitioner to attach "copies of all state court petitions,  
28 memoranda, fast track statements, briefs, and any and all other papers upon which he bases his claim of  
exhaustion."

1           Petitioner's remaining arguments in the motion for reconsideration pertain to the merits  
2 of his constitutional claim. They do not undermine the Court's prior conclusion that the  
3 petition in this matter was subject to dismissal for lack of exhaustion.

4           IT THEREFORE IS ORDERED that petitioner's motion (#14) for reconsideration is  
5 DENIED.

6                     DATED: November 7, 2006

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KENT J. DAWSON  
United States District Judge  
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